No. 95-1079

(4)

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

GEORGE MEYER,

Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY AND WASTE MANAGEMENT OF WISCONSIN, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Wisconsin's recycling law violates the Commerce Clause by regulating commerce occurring wholly outside of Wisconsin.

2. Whether Wisconsin's recycling law violates the Commerce Clause by treating similar items of commerce differently based on their place of origin.

3. Whether Wisconsin's recycling law violates the Commerce Clause by imposing a burden on interstate commerce that is clearly excessive in relation to the putative local benefits.

RULE 29.6 STATEMENT

Respondent National Solid Wastes Management Association's parent corporation is Environmental Industry Associations. It has no subsidiary corporations.

Respondent Valley Sanitation Company, Inc.'s parent corporation is Superior Services, Inc. It has no subsidiary corporations.

Respondent Land Reclamation Company's parent corporation is Sanifill, Inc. It has no has no subsidiary corporations.

Respondent Waste Management of Wisconsin, Inc.'s parent corporation is WMX Technologies, Inc. It has no subsidiary corporations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 63 F.3d. 652. The district court's opinion on summary judgment (Pet. App. 26-40), its oral decision after trial (a transcript of which is included in the appendix submitted to the court of appeals (A18-A29)), and its written memorandum and order after trial (Pet. App. 41-48) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1995. A petition for rehearing and suggestion for rehearing en banc was denied on September 20, 1995. The petition for a writ of certiorari was filed on December 18, 1995 and placed on the Court's docket on January 9, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The Wisconsin law at issue in this case prohibited any person or business from disposing of their trash in Wisconsin unless the community in which the person or business resided — whether located in Wisconsin or not — enacted and enforced an ordinance containing recycling regulations dictated by Wisconsin. The prohibition applied even if the trash seeking entrance to Wisconsin disposal facilities contained fewer recyclable materials than Wisconsin-approved garbage. And the ban was lifted only if the waste generator's local government — even if located outside Wisconsin — applied the Wisconsin-dictated requirements to *everyone* within its jurisdiction, including persons and businesses who did not dispose of their waste in Wisconsin.

The Seventh Circuit held that law invalid under the Commerce Clause of the U.S. Constitution for three independent reasons. *First*, by seeking to regulate trash generated and disposed of entirely outside of Wisconsin, the law unconstitutionally projected Wisconsin's regulations beyond its borders. *Second*, by treating similar products differently based solely on their place of origin, Wisconsin's law discriminated against interstate commerce. *Third*, the burdens that the Wisconsin law imposed upon interstate commerce were clearly excessive in relation to its putative local benefits, in violation of the Commerce Clause.

In reaching these conclusions, the Seventh Circuit did not announce any new rule of law; rather it closely followed this

Court's precedents. And the court's decision neither created nor perpetuated any conflict among the courts of appeals. Accordingly, there is no reason whatever why the decision below warrants this Court's review, and the certiorari petition should be denied.

A. The Wisconsin Law

The Wisconsin recycling provision banned eleven types of recyclable materials from Wisconsin disposal facilities (see Wis. Stat. § 159.07(3)-(4)) unless those materials originated in a community (whether located in Wisconsin or elsewhere) that enacted and enforced the recycling program codified at Wis. Stat. § 159.11 and its implementing regulations. See *id.* § 159.07(7) & Wis. Admin. Code Ch. NR 544.[1]

Although Wisconsin purported to bar only recyclable materials from its disposal facilities, its statute's effect was necessarily much broader. That is because even state-of-the-art recycling programs generally fail to remove all of the recyclable materials that inevitably are found in any municipal solid waste stream. A88-A89 ¶ 39.[2] Consequently, the Wisconsin recycling program requirement effectively prohibited disposal within Wisconsin of any municipal solid waste originating in a community that had not adopted a Wisconsin-approved recycling program.

Among the many required components of the Wisconsin-dictated recycling program were:

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[1] The recycling provision went into effect on January 1, 1995, while this action was pending before the Seventh Circuit. The State suspended enforcement of the provision against out-of-State waste after the Seventh Circuit issued its decision in August 1995.

[2] Citations to "A__" refer to the appendix submitted to the court of appeals.

- **Mandatory Recycling by All Sectors of Community**: The statute directed all residents and businesses to separate for recycling eleven types of materials.
- **Mandates on Building Owners**: The law required owners of large residential buildings and of all commercial establishments either (a) to treat their buildings' waste at a facility that separates out the banned recyclable materials or (b) to provide tenants with the means to recycle the required materials and to arrange for those materials to be collected separately from nonrecyclable waste and to be delivered to a recycling facility.
- **Mandates on Local Government**: The statute directed local governments (in both Wisconsin and other states) to provide recycling services for their residents, ensure the collection and marketing of recyclable materials, and provide for the processing of residentially-generated recyclables at a plant approved by the Wisconsin Department of Natural Resources.
- **Public Education**: The provision required local governments and building owners to adopt and fund continuing public education programs.
- **Enactment and Enforcement of a Local Ordinance**: The statute mandated local governments (in both Wisconsin and other states) to provide funding for recycling programs and to enact and enforce against *all* businesses and residences an ordinance codifying the Wisconsin recycling requirements. The ordinance had to: require separation of recyclables, prohibit the disposal or incineration of items that were separated for recycling, and prescribe penalties *specified by*

> *Wisconsin* for violations of the recycling requirements.

Wis. Stat. § 159.11(2); Wis. Admin. Code Ch. NR 544. See also Pet. App. 2-5.

At the time this action was tried (shortly before the statute's effective date), only twelve out-of-state communities had applied for and obtained Wisconsin certification of their recycling programs. A89 ¶ 42.[3] The parties stipulated before trial that, "[i]f the effective recycling program requirement is permitted to go into effect, and no additional out-of-state communities apply for and gain Wisconsin approval of their recycling programs, approximately 75% of the out-of-state solid waste currently disposed of in Wisconsin will be excluded from disposal in Wisconsin as of January 1, 1995." A89 ¶ 43.

B. The Extraterritorial Effect Of The Wisconsin Law

A critical feature of the Wisconsin law was that it did not limit its recycling mandate to those out-of-state residents or businesses whose waste was disposed of in Wisconsin. Rather, it mandated that *all* of a community's businesses and residents recycle the banned materials and that the community enact and enforce against *all* businesses and residents an ordinance requiring recycling of the eleven materials and imposing penalties for insufficient compliance. The court of appeals explained (Pet. App. 5):

> With respect to out-of-state communities, the statute thus obligates every waste generator in a community * * * to adhere to Wisconsin's standards, either by separating out recyclable materials or by sending waste to a materials recovery facility, even if their waste is intended for dumps in Illinois, Minnesota,

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[3] In contrast, all but three of Wisconsin's 1,095 communities had received state approval of their recycling programs. A88 ¶ 37.

> or Iowa. Everyone in the community either must separate recyclables or must use a materials recovery facility in order for anyone to receive access to Wisconsin's landfills.

Generally (although not always), local governments arrange for the collection and disposal of solid waste from private and small multi-unit homes. Local governments rarely, however, provide such services for commercial or industrial entities or for large residential buildings. Those entities contract on their own for waste collection and disposal services, and their local governments play little or no role in their choice of service. Accordingly, waste generated in a given community often will go to a number of different disposal sites, and those different disposal sites may be located in different communities or in different States. See A85-A86 ¶¶ 22-26.

Rockford, Illinois provides a good example of this phenomenon. Prior to the statute's effective date, residents of Rockford (1990 population 139,426) disposed of *all* residential solid waste and 65 percent of commercial solid waste at various disposal sites in *Illinois*. 35 percent of Rockford's commercial solid waste stream, however, was disposed of in Wisconsin. A80. In order for that 35 percent of the commercial waste stream to be readmitted to Wisconsin disposal facilities under the recycling statute, the 139,426 Rockford, Illinois residents whose waste had no connection to Wisconsin would have had to abide by the Wisconsin-dictated law, as would have all of Rockford's businesses, including the businesses that produced the 65 percent of commercial waste that had absolutely no connection with Wisconsin.[4]

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[4] Not surprisingly, Rockford did not alter its recycling program to conform to Wisconsin's law. During the period the law was in effect, therefore, municipal solid waste from Rockford was not permitted to enter Wisconsin's disposal facilities.

Rockford was not an isolated case. The district court found that if all non-Wisconsin communities whose waste generators sent some waste to Wisconsin before the law's effective date had acquiesced in Wisconsin's demand to comply with its recycling law, then *80 percent* of the out-of-state waste subjected to the Wisconsin-mandated program would be waste not disposed of in Wisconsin. Pet. App. 18. In other words, the *Wisconsin law would have governed four times as much out-of-state waste with no connection to Wisconsin as out-of-state waste with some connection to Wisconsin.*

C. The Proceedings Below

Respondents moved for summary judgment in the district court, arguing that the Wisconsin-dictated recycling program requirement, on its face, violated the Commerce Clause because it failed the strict scrutiny Commerce Clause test applicable to measures that regulate extraterritorially or discriminate against interstate commerce. See, *e.g.*, *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2024 (1992); *Healy* v. *The Beer Institute*, 491 U.S. 324, 336-337 (1989). The district court rejected those arguments and ordered a trial on whether the Wisconsin-dictated recycling program requirement violated the more lenient Commerce Clause standard set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), which asks whether "the burden imposed on [interstate] commerce [by the challenged statute] is clearly excessive in relation to the putative local benefits." See Pet. App. 30-37. The court found that the burden of the Wisconsin-dictated recycling program requirement was not clearly excessive. Pet. App. 41-48.

On appeal, the Seventh Circuit reversed the district court's ruling on three independent grounds. First, the court held that the statute on its face violated the Commerce Clause principle barring one state from regulating commerce occurring wholly in other states. Pet. App. 11-19. Second,

the court concluded, by treating similar products differently based solely on their community of origin, the statute on its face discriminated against interstate commerce. *Id.* at 19-20.

These two findings, the court explained, required the State to demonstrate, under rigorous scrutiny, that it could not adequately serve its interests through nonextraterritorial and nondiscriminatory alternatives. Because the State pointed to nothing in the record that allowed it to meet that heavy burden, the statute was invalid on both of these grounds. Pet. App. 20-21.

Third, the court of appeals held that even if the district court had correctly decided to apply the lesser standard articulated in *Pike*, the statute still violated the Commerce Clause because the State easily could serve its environmental-protection interests without mandating that countless non-Wisconsin waste generators with no connection to Wisconsin conform their conduct to Wisconsin law. Pet. App. 22-23.

REASONS FOR DENYING THE PETITION

The decision below is correct and does not conflict with any decision of this Court or of another court of appeals. No member of the panel dissented, and no judge voted to rehear the case en banc. Review by this Court is not warranted.

The State's principal submission is that the court of appeals erred in concluding that the Commerce Clause bars the States from engaging in extraterritorial regulation; supposedly the court of appeals "create[d] a new independent Commerce Clause test" concerning "regulation of commerce in other states." Pet. 5, 6. But this Court's decisions in *Healy* v. *The Beer Institute*, 491 U.S. 324 (1989), and *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573 (1986), expressly hold that the Commerce Clause bars extraterritorial state regulation. It is thus the State that seriously misconstrues this Court's jurisprudence.

Moreover, the court of appeals found the Wisconsin law unconstitutional on three independent grounds. The State accordingly must demonstrate that *each* of those three determinations warrants review by this Court. The State simply cannot carry that extraordinarily heavy burden.

A. The Wisconsin Law Violates The Commerce Clause's Prohibition Against Extraterritorial Regulation.

1. The Court Of Appeals Correctly Concluded That The Wisconsin Law Unconstitutionally Regulates Commerce Occurring Entirely Outside Of The State's Borders.

This Court repeatedly has made clear that the Commerce Clause precludes a State from enacting a law that has the effect of regulating markets other than its own:

- "First, the 'Commerce Clause * * * precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State;'"
- "Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority * * * . The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State;"
- "Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States * * * . Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."

Healy, 491 U.S. at 336-337 (citations omitted). See also *C & A Carbone, Inc.* v. *Town of Clarkstown*, 114 S. Ct. 1677, 1683 (1994) ("States and localities may not attach restrictions to exports or imports in order to control commerce in other states"); *Quill Corp.* v. *North Dakota*, 112 S. Ct. 1904, 1912 (1992) (State may not tax out-of-state business unless out-of-state business has "substantial nexus" with the State); *Brown-Forman*, 476 U.S. at 584 (declaring statute unconstitutional without further inquiry after Court determined that statute directly regulated commerce in other states); *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, 521-526 (1935) (declaring unconstitutional New York law that had effect of regulating commerce in other States).[5]

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[5] Dismissing the first ten pages of this Court's legal discussion in *Healy* and nearly the entirety of *Brown-Forman* as mere "lofty language" (Pet. 11) and "*dicta*" (Pet. 13), the State advances the remarkable contention that the Commerce Clause does not bar extraterritorial regulation. The court of appeals correctly rejected this contention, discussing in detail the "long line of cases that considered whether state laws violated the Commerce Clause by regulating or controlling commerce occurring wholly outside the legislating state." Pet. App. 12-13; see also *id.* at 13-18. Indeed, this Court's discussion of the extraterritorial impact of the Connecticut statute at issue in *Healy* nowhere even mentioned a claim of discrimination. See 491 U.S. at 335-340. It was only after concluding that the statute violated the Commerce Clause's prohibition against extraterritorial regulation that the Court went on to find that "[t]he Connecticut statute, moreover, violates the Commerce Clause *in a second respect*: On its face, the statute discriminates * * * ." *Id.* at 340 (emphasis added). The plaintiff in *Brown-Forman* conceded that the challenged statute was "evenhand[ed]" and did *not* discriminate against interstate commerce. See 476 U.S. at 579. Thus, there can be no doubt that the Commerce Clause's prohibition against extraterritorial regulation is independent from the antidiscrimination principle.

Healy and *Brown-Forman* well illustrate the governing principle. Both decisions reviewed state statutes requiring beer sellers in Connecticut and New York, respectively, to affirm that they were not charging Connecticut or New York consumers a higher price than the seller charged anywhere else. Although the States directed their regulation only at commerce occurring within their borders, the affirmation requirements had the practical effect of prohibiting beer sellers from raising their prices in other States once they "affirmed" those prices to Connecticut and New York. Because the statutes effectively set prices for transactions occurring wholly outside of the States' borders, this Court struck them down. See *Healy*, 491 U.S. at 337-340; *Brown-Forman*, 476 U.S. at 582-584.

The Wisconsin law is invalid for the same reason. The court of appeals stated that "[t]he practical impact of the Wisconsin statute on economic activity completely outside the State reveals its basic infirmity: It essentially controls the conduct of those engaged in commerce occurring wholly outside the State of Wisconsin and therefore directly regulates interstate commerce," in violation of the principle set forth in *Healy*. Pet. App. 11; see also *id.* at 18 ("[t]he practical

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Nor can we find any basis in precedent or reason for the State's attempt to limit *Healy* to price affirmation cases or "economic regulations." Pet. 12, 13. As the Seventh Circuit noted, the courts of appeals consistently have applied *Healy* in a variety of contexts, and not a single court has confined *Healy*'s scope to price affirmation statutes. Pet. App. 15-16. Moreover, this Court itself repeatedly has concluded that health and safety measures are the equivalent of "economic regulations" for the purpose of Commerce Clause scrutiny. See *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality*, 114 S. Ct. 1345, 1354 (1994) (even if purpose of discriminatory statute is to protect environment, strict scrutiny standard applies); *Fort Gratiot*, 112 S. Ct. at 2023; *Philadelphia* v. *New Jersey*, 437 U.S. 617, 621-623 (1978).

effect of the Wisconsin legislation is to impose the requirements of Wisconsin law on numerous waste generators who neither reside, nor dispose of their waste in Wisconsin; eighty percent of the out-of-state waste subject to this legislation is destined for non-Wisconsin landfills").

After the effective date of the Wisconsin law, for example, the Rockford, Illinois commercial enterprises that previously used Wisconsin disposal facilities could not continue to use them, unless the 139,426 Rockford, *Illinois* residents and numerous *Illinois* businesses that generate their waste in *Illinois* and dispose of their waste in *Illinois* abided by *Wisconsin* law. The court of appeals correctly concluded that that result — conditioning access to a State's markets upon broad extraterritorial application of the importing State's regulatory program — was impermissible. "Wisconsin's approach to sound solid waste management, and no one else's, must govern, even when the product will never cross its borders. The Commerce Clause contemplates a very different market among the states of the union." Pet. App. 18.[6]

The court of appeals assumed, *arguendo*, that even an extraterritorial regulation might be upheld if it passed muster under the "strict scrutiny" standard applicable to state laws that discriminate against interstate commerce. Pet. App. 19-20 n.10.[7] Statutes that discriminate against interstate

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[6] In light of the statute's mandate that hundreds of thousands of non-Wisconsin residents and businesses with no connection to Wisconsin abide by Wisconsin law, we cannot understand the State's claim (Pet. 6) that the statute has only an "incidental impact" on commerce occurring outside of Wisconsin.

[7] The State is thus flatly wrong in asserting (Pet. 10) that the court of appeals adopted an "irrebuttable presumption." Other courts, however, have concluded that an impermissible extraterritorial effect renders a state law *per se* invalid. See, *e.g.*,

commerce may survive only if the State proves that the challenged statute "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co.* v. *Limbach*, 486 U.S. 269, 278 (1988). Accord *Oregon Waste Systems*, 114 S. Ct. at 1351 (same); *C & A Carbone*, 114 S. Ct. at 1683 (State must "demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest").[8]

The Seventh Circuit correctly concluded that "[t]he solid waste legislation itself makes clear that there is an available, less discriminatory alternative that could serve the State's purpose just as well as the requirement that the entire community follow the dictates of Wisconsin's plan." Pet. App. 21. That alternative is the use of a materials recovery facility ("MRF") — a waste treatment center that separates recyclable materials from nonrecyclable materials. *Ibid.*

Wisconsin's statute already allows businesses to use these facilities rather than separating their materials for recycling, but only if the businesses are located in a community with a Wisconsin-approved program. Wis. Stat. § 159.11(2)(c). Businesses that use such a facility, however, need not observe *any* of the other statutory requirements: separating recyclable from other waste, educating employees, etc. Because the MRF alternative is generator-based, not community based — indeed, the statute exempted generators that use an MRF

Cotto Waxo Co. v. *Williams*, 46 F.3d 790, 793 (8th Cir. 1995) (statute with practical effect of controlling conduct beyond enacting State's borders is *per se* invalid); *National Collegiate Athletic Ass'n* v. *Miller*, 10 F.3d 633, 640 (9th Cir. 1993), cert. denied, 114 S. Ct. 1543 (1994) (same).

[8] Only one state statute ever has survived this Court's application of this level of scrutiny, and that was because the State demonstrated a lack of *any* alternative to the discriminatory law. See *Maine* v. *Taylor*, 477 U.S. 131, 140 (1986).

from the otherwise-applicable community standards — the court of appeals found no reason why Wisconsin could not extend the option to generators in unapproved communities who wish to dispose of their waste in Wisconsin.

Wisconsin argued below — and presumably will argue again here — that the use of such facilities would not ensure recycling rates equal to those its program achieves. See, *e.g.*, Trial Transcript 102-104. But *the Wisconsin law itself* provided this option for generators in communities that adopted the Wisconsin program; the State simply did not demonstrate why its interests would be served less effectively by allowing generators in non-approved communities the same choice. "Accordingly," the court of appeals concluded, "Wisconsin could realize its goals of conserving landfill space and protecting the environment by mandating that all waste entering the State first be treated at a [MRF] with the capacity to effect this separation. Given the existence of such a nondiscriminatory alternative that serves adequately Wisconsin's legitimate concerns, the discriminatory legislation cannot be justified." Pet. App. 21.[9]

2. The Court Of Appeals' Decision Does Not Conflict With Any Decision Of This Court Or A Court of Appeals.

The cases the State offers in an attempt to manufacture a conflict with the decision below fail to support its view that the restraint on extraterritorial regulation does not exist. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), for example, did not even remotely concern the extraterritorial prong of the Commerce Clause, let alone reject the Seventh Circuit's view of *Healy* and its progeny.

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[9] As the Seventh Circuit noted, we presented numerous other non-discriminatory and non-extraterritorial alternatives to the district court and the court of appeals — alternatives whose viability the State never discredited. See Pet. App. 8 n.4.

See Pet. 6. Instead, the Commerce Clause claim in *Clover Leaf Creamery*, which upheld a Minnesota statute banning the sale of milk in plastic containers in Minnesota, was grounded solely in the anti-discrimination principle. Unlike Wisconsin, Minnesota did not require out-of-state producers to comply with Minnesota law with respect to transactions occurring outside of Minnesota. Nor (contrary to the State's claim (Pet. 6)) did the Minnesota law have the practical effect of regulating extraterritorially, *as this Court specifically emphasized*: "most dairies package their products in more than one type of container, [and so] the inconvenience of having to conform to different packaging requirements in Minnesota and the surrounding States should be slight." 449 U.S. at 472.[10]

The State's attempt to create a conflict between the Seventh Circuit's decision here and that of the Tenth Circuit in *Cotto-Waxo Co.* v. *Williams*, 46 F.3d 790 (8th Cir. 1995), is equally unavailing. See Pet. 19. The *Cotto-Waxo* court interpreted this Court's precedents precisely as the Seventh Circuit did, explaining, for example, that "a statute has [an impermissible] extraterritorial reach when it necessarily requires out-of-state commerce to be conducted according to in-state terms." 46 F.3d at 794. It was only because the

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[10] The State is also wrong when it argues for limiting *Healy* (Pet. 6) by claiming that "a state statute's control of out-of-state commerce" cannot render a law unconstitutional "because such a distinction would clear the field of any state regulation at all." That argument confuses regulation of interstate commerce with regulation of commerce wholly unrelated to the regulating State. Thus, Wisconsin obviously may regulate the content of waste disposed of within the State even though such regulations as a practical matter may require out-of-State waste generators to alter their out-of-State conduct. What Wisconsin may not do is what it tried to do here: regulate interstate commerce that has no relationship to Wisconsin.

Minnesota statute at issue in *Cotto-Waxo* applied *solely* to conduct within Minnesota and did *not* require non-Minnesota commerce to comply with Minnesota law — in sharp contrast to the Wisconsin law at issue here — that the Tenth Circuit concluded it did not transgress against the Commerce Clause's prohibition on extraterritorial regulation. *Ibid.* That conclusion fully accords with the holding below.[11]

B. The Wisconsin Law Violates The Commerce Clause's Prohibition Against Treating Similar Products Differently Based On The Product's Place Of Origin.

The recycling program violates the Commerce Clause for a second, independent reason: it discriminates against interstate commerce by conditioning entry of waste into Wisconsin's markets exclusively on the laws in force in the waste's community of origin.

1. A State May Not Condition A Product's Entry To Its Market On The Status Of The Law In The Product's State Of Origin.

The Commerce Clause prohibits States from conditioning access to their markets on the status of the law in the product's state of origin. *New Energy*, *supra*; *Great Atlantic*

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[11] The State's claim that the decision below conflicts with *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), is patently absurd. In *Lopez*, the Court found a federal law prohibiting possession of a gun in a school zone beyond Congress' Commerce Clause power because the activity criminalized — simple possession of a firearm — had no arguable nexus to interstate commerce. *Id.* at 1630-1631. The Court explained that regulating activity occurring wholly within a State is the prerogative of the State in which that activity occurs. Here, the challenged aspect of the Wisconsin law violates that very precept; it is precisely because Wisconsin tried to regulate transactions occurring wholly within the jurisdiction of *other* States that Seventh Circuit struck down its enactment.

& Pacific Tea Co. v. *Cottrell*, 424 U.S. 366 (1976). Laws of this sort run afoul of the Commerce Clause for two related reasons: they have the practical effect of discriminating among products for no reason other than the products' place of origin, and they hold interstate commerce hostage to the policies of state and local governments.

New Energy illustrates the constitutional prohibition against this type of enactment. The Court there declared unconstitutional an Ohio tax credit for fuels containing ethanol produced either in Ohio or in a State that granted a similar credit to fuels containing Ohio ethanol. The Court explained that a statute that conditions favored treatment on the exporting state's laws "explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States, and thus on its face appears to violate the cardinal requirement of nondiscrimination." 486 U.S. at 274.

As the Court explained in *Cottrell*, the problems posed by such laws extend beyond their discriminatory impact upon interstate commerce; they threaten the very existence of such commerce. For that reason, *Cottrell* struck down a Mississippi statute conditioning the sale of out-of-state milk in Mississippi on whether the exporting State agreed to the sale of Mississippi milk on a reciprocal basis:

> Mississippi may not use the threat of economic isolation as a weapon to force sister States to enter into even a desirable reciprocity agreement. * * * To allow Mississippi to insist that a sister State either [adopt a law] acceptable to Mississippi or else be absolutely foreclosed from exporting its products to Mississippi would plainly "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." No "parochial legislative polic[y]" could be more precisely calculated to open "the door * * * to rivalries and reprisals that were meant to be averted by subjecting

> commerce between the states to the power of the nation."

Cottrell, 424 U.S. at 379-380 (citations omitted).

The Wisconsin-dictated recycling program requirement is indistinguishable from the laws struck down in *New Energy* and *Cottrell*. Before admitting out-of-state municipal solid waste, Wisconsin did not say "tell me what is in this waste." Instead, it stated "tell me where this waste is from." If, after checking its list of approved communities, Wisconsin determined that the waste came from a community that had enacted the Wisconsin program, then that waste was admitted to Wisconsin. Waste not from such a community was excluded, *even if it was otherwise identical to admissible waste*. As the court of appeals concluded, "the Wisconsin disposal site is deprived of the waste from out-of-state not because it is more noxious than waste produced the Wisconsin way, but simply because it comes from a community whose ways are not Wisconsin's ways." Pet. App. 20.

The discriminatory character of the Wisconsin law triggers the strict scrutiny standard. See *New Energy*, 486 U.S. at 278; pages 12-13, *supra*. As we have already discussed (see pages 13-14), the court of appeals correctly concluded that the Wisconsin law fails that test.

2. The Court Of Appeals' Application Of The Anti-Discrimination Principle Does Not Conflict With Any Decision Of This Court Or A Court Of Appeals.

The State's answer to the court of appeals' discrimination discussion is similar to its response to the extraterritoriality holding. It dismisses as mere *dicta* the rationale of an entire line of decisions prohibiting exactly what Wisconsin did, and it argues — without citing to a single decision supporting its view or upholding a law like the one it defends — that a statute is immune from Commerce Clause scrutiny unless it expressly treats out-of-state products less favorably than in-

state products in an effort to advance protectionist goals. See Pet. 6, 8, 11, 17. Those arguments are as wrong as the State's claim that the Commerce Clause does not bar extraterritorial regulation.

To begin with, this Court specifically has *rejected* the claim that proof of a protectionist motive is a prerequisite to subjecting a statute to the strict scrutiny standard. See *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009, 2015 n.6 (1992). Nor may *New Energy* or *Cottrell* be distinguished on that ground. In *New Energy*, for example, there was no suggestion that Ohio intended to gain advantages exclusively for its citizens. To the contrary, Ohio happily would have extended the exact same beneficial tax treatment to other States' ethanol producers, as long as the other States agreed to reciprocate. It was only because, as here, other States refused to accede to the enacting State's demand, that Ohio's law disadvantaged out-of-state consumers. Nevertheless, because Ohio attempted to use trade barriers as a weapon — because it conditioned its willingness to treat other ethanol producers equally on the policy set by the home States of those other producers — this Court struck down the Ohio statute. See 486 U.S. at 274.[12]

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[12] Moreover, the Wisconsin statute *did* have the effect of favoring of in-state interests, because, as in the *New Energy* line of decisions, most exporting communities declined to submit to Wisconsin's demands. While the law was in effect, virtually all Wisconsin residents could use their waste disposal facility of choice, while 75 percent of the out-of-state solid waste that previously was disposed of in Wisconsin was denied access to its generators' disposal facilities of choice. Consequently, many out-of-state waste generators could not choose the disposal facility that provided the best price and services, the lowest transportation costs and the desired amount of protection against potential liability for environmental damage. In contrast, Wisconsin waste generators retained the ability to make such choices. And, of course, barring a large amount of out-of-state waste from Wisconsin reserved

It also is irrelevant that the effective recycling program requirement purported to apply evenhandedly to both in-State and out-of-State waste. Pet. 9. It is true that the law *theoretically* could have barred some Wisconsin waste generators from using Wisconsin disposal facilities (although that, in fact, was not the case (see *supra* note 3)). But, as this Court has stated on more than one occasion, "'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.'" *Fort Gratiot*, 112 S. Ct. at 2025, quoting *Brimmer* v. *Rebman*, 138 U.S. 78, 82-83 (1891), quoting *Minnesota* v. *Barber*, 136 U.S. 313, 326 (1890).

Perhaps recognizing that the Court may actually have meant what it said in the *New Energy* line of cases, the State argues (Pet. 7-8) that, in contrast to the statutes at issue in those cases, the Wisconsin-dictated recycling program requirement does not discriminate because it serves as a perfect proxy for the content of the waste seeking entrance to the State. But the statute plainly regulates on the basis of place of origin; that fact implicates strict scrutiny. Whether regulation on that basis may be justified accordingly must be determined by applying the strict scrutiny test. Cf. *New Energy*, 486 U.S. at 278. And the fact that the State cannot satisfy that test shows that its "proxy" argument is incorrect.

Indeed, even the State is forced to admit that the Wisconsin law is not a *perfect* proxy. It claims only that Wisconsin's regime will "on average" remove more recyclables (Pet. 8), and it does not dispute that some waste generators using different programs remove more recyclables than some Wisconsin generators. But as this Court has

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Wisconsin disposal facilities for the exclusive use of Wisconsin residents. See A88 ¶ 37, A89 ¶¶ 42-43.

explained, as long as one article of commerce is excluded from a State's markets based on its place of origin rather than its own characteristics, strict scrutiny applies: "[u]nder our cases, unless one of several narrow bases of justification is shown, actual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question, whether discrimination has occurred." *Associated Industries of Mo.* v. *Lohman*, 114 S. Ct. 1815, 1822 (1994) (citations omitted). See also *Wyoming* v. *Oklahoma*, 112 S. Ct. 789, 801 (1992) (Oklahoma statute requiring Oklahoma coal-fired electric plants to use at least ten percent Oklahoma coal unconstitutionally discriminates against interstate commerce despite state's claim that statute does not impose an "overall burden" on interstate commerce: "[t]he volume of commerce affected measures only the *extent* of the discrimination; it is of no relevance to the determination whether a state has discriminated against interstate commerce") (emphasis in original).

C. The Wisconsin Law Is Unconstitutional Because It Imposes A Burden On Interstate Commerce That Is Clearly Excessive In Relation To The Requirement's Putative Local Benefits.

There is a final reason why the decision below does not warrant this Court's review: after conducting a fact-intensive review of the trial record, the Seventh Circuit held that even if the Wisconsin statute had not fallen to the prohibitions against extraterritorial regulation and discriminatory enactments, it still would be invalid under *Pike*.

A state law is invalid under *Pike* if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits. * * * [T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 142.

Reviewing the evidence presented to the district court, the Seventh Circuit concluded that although Wisconsin has a substantial interest in conserving disposal capacity *in Wisconsin*, it "has no legitimate interest in requiring that out-of-state generators conform to the Wisconsin plan when those entities are not going to transport the waste to Wisconsin." Pet. App. 22-23. "On the other hand," the court found, "the burden on the out-of-state generator is substantial." *Id.* at 23. Because the Wisconsin statute itself codified an alternative that would have alleviated the substantial burden imposed on these out-of-state generators — the MRF (see pages 13-14, *supra*) — the court concluded that the Wisconsin law's "very significant burden on interstate commerce * * * far outweighs the permissible benefits that Wisconsin, as a member of the federal union, has a right to expect." Pet. App. at 23.

The State does not even attempt to show that this fact-based determination is worthy of this Court's attention. But this ground of decision provides an independent basis for the court of appeals' judgment of unconstitutionality. Even if the Court were inclined to review the court of appeals' other determinations, therefore, the *Pike* holding provides an alternate basis for the court of appeals' judgment. The petition accordingly should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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